No. 20,386

IN THE

United States Court of Appeals

For the Ninth Circuit

CHARLES CORNET and
REX STIDHAM WINDOM, JR.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the District of Nevada

APPELLEE'S ANSWERING BRIEF

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Subject Index

Table of Authorities Cited

Cases

Statutes

Rules

Treatises

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I. STATEMENT OF JURISDICTIONAL FACTS

The information herein (T.R. p. 19)[1] charged a violation of Title 18, United States Code, Section 1341, an offense against the United States. Under Title 18, United States Code, Section 3231, the District Court had original jurisdiction of this offense.

Upon the jury's verdict of guilty (R.T.T. p. 232) the Appellants were sentenced (R.T.S. pp. 2-3). It is

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[1]Throughout its brief Appellee will designate the Transcript of Record as "T.R.", the Reporter's Transcript of Trial as "R.T.T.", the Reporter's Transcript of Sentencing as "R.T.S.", and the Reporter's Transcript of the Motion of March 26, 1965 as "R.T.M.".

conceded that this Court has jurisdiction of appeals from such final decisions under the provisions of Title 28, United States Code, Section 1291, and by virtue of Rule 37(a), Federal Rules of Criminal Procedure.

II. STATEMENT OF THE CASE

Appellee does not controvert Appellants' statement of the case, as set out at pages 14 through 23 of their brief.

III. SUMMARY OF ARGUMENT

1.

Appellants' pre-trial motion to dismiss the information was properly denied because the mailing charged was alleged to have been caused by the Appellants for the purpose of executing a scheme to defraud (dealing with Appellants' First Specification of Error).

2.

The Trial Court did not err in denying the Appellants' motion for judgment of acquittal at the close of the Government's case, as there was ample evidence identifying them as the perpetrators of the crime charged (dealing with Appellants' Second Specification of Error).

3.

The Trial Court did not commit error in its instruction to the jury regarding variance, inasmuch as said instruction properly stated the law on variance and in

no way prejudiced the rights of the defendants (dealing with Appellants' Third Specification of Error).

4.

The Trial Court did not commit error by refusing to instruct the jury that the testimony of any witness could be read to them on request (dealing with Appellants' Fourth Specification of Error).

5.

The Trial Court did not err in denying Appellants' post-trial motions to dismiss the information, for judgment of acquittal and for a new trial (dealing with Appellants' Fifth Specification of Error).

IV. ARGUMENT

1.

APPELLANTS' PRE-TRIAL MOTION TO DISMISS THE INFORMATION WAS PROPERLY DENIED BECAUSE THE MAILING CHARGED WAS ALLEGED TO HAVE BEEN CAUSED BY THE APPELLANTS FOR THE PURPOSE OF EXECUTING A SCHEME TO DEFRAUD.

Appellants' first specification of error relates to the Trial Court's denial of their pre-trial motion to dismiss the information. This motion (T.R. p. 22) alleged that the District Court was without jurisdiction to try the alleged offense because the information showed on its face that the mailing charged took place after fruition of the fraudulent scheme. This argument, as expounded by defense counsel at the hearing on the motion to dismiss held on March 26, 1965

(R.T.M. pp. 3-9) and in his brief on appeal at pages 23 through 30, rests upon the tacit assumption that the scheme charged in the information was completed once the tires and service had been fraudulently secured from the Las Vegas service station.

However the Government believes that this argument misreads the information, which alleges a scheme to defraud, not the Las Vegas service station but the Phillips Petroleum Company, which issued the credit card, and the Allied Oklahoma Corporation, to whom the credit card was issued. The ultimate victim of the scheme, the parties ultimately sustaining the loss, were alleged to be the issuer and holder of the credit card, both of whom would suffer the effects of Appellant's scheme in the normal course of business only as the delivery tickets were transmitted through the mail, first to Phillips and then to Allied Oklahoma. Whether or not the Government's evidence sufficiently established that Appellants' scheme was in fact to defraud Phillips Petroleum or Allied Oklahoma rather than the Las Vegas service station is discussed in connection with Appellants' fifth specification of error below.

2.

THE TRIAL COURT DID NOT ERR IN DENYING THE APPELLANTS' MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE GOVERNMENT'S CASE, AS THERE WAS AMPLE EVIDENCE IDENTIFYING THEM AS THE PERPETRATORS OF THE CRIME CHARGED.

Appellants' second specification of error is that there was insufficient proof, as a matter of law, of

the Appellants' identity as the individuals who used the credit card in question on March 12, 1964.

The record reveals that the witness Anderson positively identified Charles Cornet as the person who drove into the Saveway Station in a Plymouth shortly after he had received a telephone inquiry about 9:00 x 14 tires (R.T.T. pp. 19-22). Anderson also identified Cornet as the person who wanted to know if Anderson had any tires and who stated it would be a credit card purchase, at which time the other man produced a credit card and passed it to Cornet, who handed it to Anderson (R.T.T. pp. 22, 25). Both men left and returned shortly thereafter with Cornet still driving the Plymouth and the other man driving a pink Lincoln (R.T.T. pp. 23-24). At the close of his direct testimony Anderson stated he was sure Cornet was one of the men who came into the station that night because Cornet had gotten tires at the station before, however he was not sure that the defendant Windom was the other man (R.T.T. p. 37). Anderson had previously stated he believed he recognized the defendant Windom but was not positive (R.T.T. p. 21).

On cross-examination Anderson stated he believed the number two individual signed the credit card delivery slip, but it could have been either man, and that Cornet was the number one man but he could not make a positive identification of the number two man (R.T.T. pp. 41-42). At page 51 of the trial transcript Anderson stated that the number two man, the one other than Cornet, signed the slip. He also recalled that he conversed with Cornet, who asked if Anderson

had the tires and said it would be a credit card purchase (R.T.T. 54-56). Anderson again stated at page 59 of the transcript that he believed the number two man signed the credit slip.

In addition defense counsel established that some time after March 12 Anderson saw both the defendants Cornet and Windom in a police lineup and identified the number one man and thought he recognized the number two man, Mr. Windom, when he saw him in the lineup (R.T.T. pp. 62-63).

John Loveland, the other filling station attendant, identified both defendants as the men he saw on March 12, 1964. Cornet was driving a Plymouth when the two men first arrived and Loveland saw him produce the credit card, though he did not see from where it came (R.T.T. pp. 64-67). At page 86 of the trial transcript Loveland again identified Cornet as the man who gave Anderson the credit card, and at pages 95-96 he stated he too had previously viewed both defendants in a police lineup and had identified both of them.

The Government also offered into evidence certain records of the Oklahoma Tax Commission which disclosed that for the year 1963 license No. XW-7139 was issued to Eugene Dickinson (R.T.T. p. 130, R. pp. 41-43). The witness Anderson had previously testified that he recorded the Oklahoma license No. XW-7139 on the delivery tickets after personally observing the license plates of the car on which the tires were placed (R.T.T. p. 58).

Eugene Dickinson, called as a Government witness, testified that on the 12th of February, 1964, he met one of the defendants at Rakin or Raney Brothers Used Car Lot in Phoenix, Arizona at which time he traded in a 1955 Lincoln bearing Oklahoma license No. XW-7139 (R.T.T. pp. 134-135). Dickinson thereafter secured a job at the car lot and saw Windom staying in an old house in back of the garage up to about the 1st of March, 1964. The last time Dickinson saw the license plate XW-7139 was when he traded it in to the car lot (R.T.T. pp. 135-137). Special Agent Roy Reger of the Federal Bureau of Investigation testified that on March 20, 1964, he arrested Rex Windom at Raney's Used Car Lot in Phoenix, Arizona. At the time of the arrest another special agent asked Windom if they could examine a 1961 light pink Lincoln sedan parked on the used car lot. Windom consented and as they approached the Lincoln commented that he had just gotten some new tires for his car. Examination of the Lincoln disclosed three new Phillips 66 premium action tread, white sidewall, 9:00-9:50 x 14 on its wheels. Subsequently, in the office of the United States Marshal, Windom denied making a statement that he had bought any new tires for his car and said that he had signed the title of the Lincoln which the agents had seen on the lot over to Mr. Raney prior to his most recent trip to Las Vegas (R.T.T. pp. 143-145). The witness Anderson had previously testified that the car on which he installed three premium action tread white sidewall tires was a pink Lincoln (R.T.T. pp. 23-24).

The witness Loveland testified he recalled that the tires were installed on a large car, brown in color (R.T.T. p. 68). After reading a statement signed by him shortly after the incident in question, Loveland recalled the car to be a late model Lincoln and believed it to be dark brown in color (R.T.T. p. 77). The Government was later permitted to read into evidence as past recollection recorded a portion of the witness's statement which described the tires as Phillips, white sidewall, of the size usually placed on a Lincoln automobile (R.T.T. p. 79).

Thus the record reveals a positive identification of the defendant Cornet by both service station attendants and a tentative identification of Windom by Anderson, and a positive identification by Loveland. Substantial circumstantial evidence exists showing Windom's access to a license plate of the same number as that on the car when the fraudulent purchase was made. Moreover, the discovery of three new Phillips tires on a car under Windom's control at the time of his arrest lends support to the visual identification by the attendants, particularly when their descriptions of the car and tires involved match those of the car and tires under Windom's control, which he described as his car for which he had just gotten new tires.

3.

THE TRIAL COURT DID NOT COMMIT ERROR IN ITS INSTRUCTION TO THE JURY REGARDING VARIANCE, INASMUCH AS SAID INSTRUCTION PROPERLY STATED THE LAW ON VARIANCE AND IN NO WAY PREJUDICED THE RIGHTS OF THE DEFENDANTS.

Appellants' third specification of error discussed under Point II of their brief at pages 30 to 42, relates to the Trial Court's instruction to the jury that any variance as to the description of the item mailed, i.e., a box rather than a letter, or as to the exact date of mailing, was immaterial. Appellants assigned this as error on the ground that the Trial Court thereby removed from the jury's consideration the factual question of whether or not the Appellants caused the use of the mails (Appellants' brief, p. 41). In this connection it is significant that defense counsel offered no instruction regarding this issue of causation, and the Court properly instructed the jury on this element of the offense (R.T.T. pp. 221-222). The Court's instruction on variance preceded its specific instructions as to causation and the elements of the crime, and in its context clearly could not have the effect of removing that issue of causation from the jury's consideration (R.T.T. pp. 219-222).

Moreover, examination of defense counsel's objection to the Court's instruction on variance reveals a failure to comply with the provision of Rule 30 of the Federal Rules of Criminal Procedure requiring a distinct statement of the grounds for an objection. Counsel objected on the grounds that the date of the

mailing was the essence of the crime of mail fraud, that the variance was known to the Government by the filing of the information (which is not supported by the record), the defendants were misled in their defense and were not properly notified of the charge against them, and that the defendants were arrested prior to the actual mailing (R.T.T. pp. 227-228). Nowhere in the entire objection is there any reference to the element of causation or any allegation that any element of the offense would be improperly removed from the jury's consideration. Thus Appellants completely failed to give the Trial Court warning of the theory which they now urge on appeal and failed to submit an instruction which would have confined the Court's instruction on variance to the Appellants' satisfaction, and they should not now be permitted to seek reversal on that theory.

It should also be noted that defense counsel, in his closing argument, commented on the fact of the defendants' arrest before completion of the mailing and urged it as grounds for acquittal (R.T.T. pp. 191-192). Similarly Government counsel, both in the opening and closing portions of his summation, reviewed the evidence relative to causation (R.T.T. pp. 181-183, 194-195, 203-205), all of which negate the possibility that the jury may have felt the element of causation had been removed from its consideration. (It should also be noted that the Court's instruction as to variance in the date, aside from its effect on the element of causation, was correct under *Ledbetter v. United States,* 170 U.S. 606, at 612, 1898.)

4.

THE TRIAL COURT DID NOT COMMIT ERROR BY REFUSING TO INSTRUCT THE JURY THAT THE TESTIMONY OF ANY WITNESS COULD BE READ TO THEM ON REQUEST.

Appellants' fourth specification of error dwells upon the Trial Court's refusal to instruct the jury that the testimony of any witness could be read to them on request. Though the Government has been unable to find any specific Ninth Circuit authority on this question, it is the rule in other circuits that allowing the reading of a witness's testimony at the request of the jury is a matter within the trial judge's discretion. *United States v. Carminati,* 247 F.2d 640 (2 Cir. 1957), cert. den. 355 U.S. 883; *Easley v. United States,* 261 F.2d 277 (5 Cir. 1958); *United States v. Rosenberg, et al.,* 195 F.2d 583 at 599 (2 Cir. 1952), cert. den. 344 U.S. 838.

No authority has been found in any circuit which would require a specific instruction informing the jury of the right to request a reading of the trial transcript, and such a practice would seem an invitation to undue delay in jury deliberations.

Appellants' brief, under Point IV, sets forth the argument that such an instruction was necessary under the peculiar circumstances of this case because of the alleged prejudicial misconduct of Government counsel in his closing argument. As set out in Appellant's brief at pages 53 to 59, the specific instances of alleged misconduct are as follows:

1. ". . . the United States Attorney argued to the jury facts not in evidence that the Government's handwriting expert couldn't possibly say that de-

> fendant Windom wrote the signature 'J. Box' because only four letters appear in the signature. There was no testimony whatever to support this statement". (Appellants' brief, p. 54)

Initially, it is admitted by the Government that there was no evidence in the record to the effect that a handwriting examiner could not identify the "J. Box" signature because of its brevity. However consideration of the exact language used by Government counsel in commenting on this subject and the context in which such comment was made reveal that no prejudicial error was committed. Thus in his closing argument defense counsel had referred to the signature on the delivery ticket and made the statements that fingerprint analysis was the simple way to positively determine who signed the card (R.T.T. pp. 187-188), that the Government obviously made the decision to wet the delivery tickets in search of fingerprints (R.T.T. p. 189), and that the Government was obligated to make handwriting analysis of the documents before they were soiled in such a condition to make an analysis impossible (R.T.T. p. 189). The only support in the record for these pronouncements by defense counsel was the testimony of the witness Jordan that the delivery tickets were not blurred when he first received them in the mail though they appeared to be blurred when he saw them at the trial (R.T.T. 118).

In response to this argument by defense counsel based on matters not of record, Government counsel attempted to point out several reasons why the Gov-

ernment might not have presented handwriting or fingerprint experts. First was mentioned the fact that testimony by a fingerprint or handwriting expert who was unable to make a positive identification would only serve to prolong the trial uselessly (R.T.T. 198). Then reference was made to the brevity of the "J. Box" signature as being consistent with a criminal desire to frustrate identification. In this connection the rhetorical question was asked ". . . how can a fingerprinting (from the context it appears this should be handwriting) expert make an honest determination that this has got to be one man or the other. There is (sic) just not sufficient letters there, and this is consistent with the criminal scheme" (R.T.T. p. 198). Then the objectionable statement was made that a good handwriting examiner needs more detail for a positive conclusion (R.T.T. p. 199). Though admittedly not based on the record, this remark was not objected to by defense counsel and was merely subsidiary to the main thrust of the argument, that the lack of handwriting identification neither proved nor disproved the Appellants' guilt.

The next instance of alleged misconduct is as follows:

2. "Secondly, the United States Attorney stated in his argument that no fingerprints would appear on the credit card slip because of the manner in which the slip would be handed to the customer." (Appellants' brief, p. 54)

The Government's argument regarding fingerprints was directed toward answering defense counsel's pro-

nouncement that the simple way to determine who signed the delivery tickets was by fingerprint analysis (R.T.T. pp. 187-188). In this connection Government counsel pointed out that absence of a defendant's fingerprints neither proved nor disproved his signing of the delivery tickets because a cautious criminal could sign a ticket without leaving fingerprints thereon. Government counsel then referred to the testimony of the witness Anderson and argued that the customer's receipt was the one which would normally be the only one on which fingerprints would be left, and this was kept by the customer (R.T.T. pp. 199-200). Defense counsel objected to this and stated in the presence of the jury that the witness had said the service station's copy was on top and the customer's copy beneath the carbon. The Trial Court stated the question was up to the jury (R.T.T. p. 200), and later instructed the jury that statements and arguments of counsel were not evidence (R.T.T. p. 210). Review of the testimony of the witness Anderson (R.T.T. pp. 44-45) indicates the defense's recollection of the witness's testimony was accurate and that the customer signed the station's copy of the ticket and received the carbon copy. However the Government feels no substantial prejudice resulted to the defendants from its misstatement, inasmuch as the Government was merely suggesting various possibilities why the signer of the delivery ticket might not have left fingerprints thereon. Moreover, defense counsel succeeded in communicating immediately to the jury his differing recollection of the testimony.

The third instance of alleged misconduct was as follows:

3. "Next, the United States Attorney challenged the seriousness of the defense on the ground that two exhibits consisting of signatures of the name 'J. Box' were taken from each of the service station attendants while they were on the stand, and the defendants rested without putting these exhibits in evidence". (Appellants' brief, p. 55)

Appellants have cited no authority which indicates that such a comment is improper and the Government can discover none. So long as the Government did not comment on or attempt to draw unfavorable inferences from the defendants' failure to take the stand there would appear to be no error in commenting on the defense's failure to offer evidence which the jury knew was available. Wigmore on Evidence, Third Edition, Sections 285-291, Failure to Produce Evidence, and cases cited therein.

The fourth instance of alleged misconduct was similar:

4. "Next, the jury was told that if the defense was serious in its contention concerning the fact the serial numbers of the tires were not placed in evidence, that counsel for the defense could have demanded from the witness Bailey or the F.B.I. agent the serial numbers in question". (Appellants' brief, p. 55)

Once again Appellants cited no authority indicating such comment is improper and the Government feels no error was committed in answering a question raised

in defense counsel's argument (R.T.T. pp. 190-191), by pointing out his failure to call available witnesses to answer his own question (R.T.T. pp. 202-203). Wigmore on Evidence, Third Edition, Sections 285-291, Failure to Produce Evidence, and cases cited therein.

Finally, Appellants' fifth instance of alleged misconduct is as follows:

5. "At the conclusion of this closing argument, the prosecutor finally stated '(This case) was brought because the Government honestly believes the defendants are guilty and deserve to be punished' . . ." (Appellants' brief, p. 55)

The statement complained of appears at page 206 of the trial transcript and in its entirety reads as follows:

> "Now, I think I had better quit now before I go on too long and risk boring you. All I want to say is I honestly don't believe this is a sick case. It would not have been brought if it was a sick case. It was brought because the Government honestly believes the Defendants are guilty and deserved to be punished and I think that after you consider the evidence, consider the demeanor of the witnesses and whether you think they testified truthfully, consider all these consequences that the Defendants have attempted to explain away, consider how reasonable Mr. Claiborne's explanations are and after considering all of that, I honestly think that you will be able to come to an honest conclusion that these Defendants are guilty beyond a reasonable doubt, and that you will be able to return with the verdict which says

> that we the jury upon our oath do say that we find the Defendants guilty of the offense charged. Thank you."

This statement was made in response to the following remarks by defense counsel:

> "Unlike Mr. DeFeo, I am wrong sometimes, but I don't want my clients to be blamed for my errors or for being wrong in the courtroom or for the manner in which I object to particular evidence. Trying to shift the burden in this case isn't going to help him at all, because I will tell you this, he has got a sick case and he knows it, and he knows it. So, it is to the Government's advantage, if he has a sick case and he knows it, to try to say, 'Look at counsel, he is terrible, he does this and he does that, so his clients are guilty.' Personalities have no part in this trial, whether you like me or not, it is immaterial, and whether you care for Mr. DeFeo or not is immaterial. It is the evidence and whether or not they have proven it beyond a reasonable doubt, which I say they haven't, and which he says they have, and that is the ultimate decision in this case you will have to make."

Government counsel did not express any belief in the guilt of the defendants which would convey to the jury the impression that it was based on evidence outside the record. In view of defense counsel's allegation that Government counsel had a sick case and realized it, the Government's reply was both necessary and proper.

5.

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANTS' POST-TRIAL MOTIONS TO DISMISS THE INFORMATION, FOR JUDGMENT OF ACQUITTAL AND FOR A NEW TRIAL.

Appellants' fifth and final specification of error relates to the Trial Court's denial of defendants' motions to dismiss the information, for judgment of acquittal, and for new trial. The grounds for this specification of error are not set forth in Appellants' brief, but presumably the motions for judgment of acquittal and new trial are based on the same grounds as those in Appellants' specifications of error, numbers 2, 3, and 4, i.e., the alleged failure to prove identity, the instruction on variance and the refusal to instruct that the jury could request reading of each witness's testimony. Since each of those issues has been discussed in connection with the applicable specification of error, they will not be repeated here. Appellants' fifth specification of error also relates to denial of their motion to dismiss the information, which presumably relates to the argument found in Points I and II of Appellants' brief at pages 10 through 42. This argument is that the mailing charged in the information was only incidental and collateral to the fraudulent scheme which had already been fully executed, and that the F.B.I., after learning of the misuse of the credit card, caused the use of the mails to prosecute the defendants (Appellants' brief, p. 35). This argument and the cases cited at pages 23 through 29 of Appellants' brief proceed upon the assumption that the scheme to defraud alleged in the information had been completed before any use of the mails took

place. This contention overlooks the fact that the victim of the scheme to defraud, according to the testimony of the witness Statham, was Phillips Petroleum Company, which sustained a bad debt loss on the transactions involved in the information (R.T.T. pp. 121-123).

Of course Appellants may contend that their scheme was limited to secure the tires and services in question, without any concern for whom the ultimate victim of their fraud might be. Such a defense runs afoul of the established rule that every man is presumed to intend the natural and probable consequences of his acts, which in this case were the forwarding of the delivery tickets to Phillips by mail and the resultant loss to Phillips. *Pereira v. United States,* 347 U.S. 1 at 9 (1954); *Cramer v. United States,* 325 U.S. 1 at 31 (1945).

Moreover, as pointed out in *Adams v. United States,* 312 F.2d 137 (5th Cir. 1963), the Supreme Court cases of *Kann v. United States,* 323 U.S. 88, 65 S.Ct. 148 (1944) and *Parr v. United States,* 363 U.S. 370, 80 S.Ct. 1171 (1960) are distinguishable from the typical credit card situation.

> "* * * in *Kann,* various officers of a corporation organized another corporation, which served as a conduit through which the profits of the former were diverted to the officers. Various checks were drawn by the latter corporation in favor of the officers, and the clearing of those checks through the mails formed the basis of the alleged violation of the statute. Pointing out that in each case the officer-payee had received the

money irrevocably prior to any mailing, the court stated that it was immaterial to the officers' scheme how the paying banks would collect on the checks. Therefore, the subsequent use of the mails was merely 'incidental and collateral' to the scheme and not a part of it.

"In *Parr,* three of the counts against two of the petitioners were based upon the fact that they used the gasoline credit card of a school district, on isolated occasions, to obtain gasoline for their personal use. The evidence showed that they, in conjunction with other of the petitioners, were in control of the school district. The mailings complained of were two invoices sent by the oil company to the district and the district's check mailed back in payment." (312 F.2d at 137)

As pointed out in *Adams,* these two cases cannot be taken as establishing the proposition that once a defendant has obtained that which he set out to obtain through fraudulent means, no subsequent mailing can form the basis of a prosecution under Section 1341. Therefore, the fact that in the present case the mailing of the delivery tickets from Las Vegas to Kansas City, Missouri, occurred only after the sale had been made on March 12, 1964, that is, after the appellant had received the goods described in the delivery tickets, does not preclude the mailing having been done in execution of the defendants' scheme to obtain property by fraud and false pretenses.

Thus, in *Adams,* the 5th Circuit held that:

"The necessary element, that the mailing be 'in execution of' the scheme, is present if the use of

the mails is only an incident to a material element of the scheme, and if the scheme reasonably contemplated the use of the mails. In our opinion, the important question is whether the use of the mails was significantly related to those operative facts making the fraud possible or constituting the fraud. In the present case, the essence of appellant's fraudulent scheme was the utilization of the practice of Gulf distributors to extend credit on the faith of Gulf credit cards. Were it not for that practice, appellant's scheme could not, of course, have existed. Appellant violated Sect. 1341, because the practice of extending credit was inseparately connected with the use of the mails to forward the sales slips to Gulf Oil Company. The fraudulent scheme was possible only because Gulf distributors extended credit, but extension of credit presupposed that the distributors would use the mails to forward the slips to Gulf for ultimate presentation to the card-holders. Appellant's scheme reasonably contemplated the utilization of a commercial practice which, taken in its entirety, embraced the use of the mails; and, at the very least, therefore, the use of the mails to forward the sales slips was incident to a material part of the scheme, viz., the extension of credit.

"In neither *Parr* nor *Kann,* however, did the operative facts making the fraud possible or constituting the fraud involve the use of the mails. In *Parr,* the essence of the fraud lay in the abuse of the petitioners' positions in the school district; in *Kann,* it lay in an abuse of position by corporate officials. The use of the mails was not related to the essential elements of the fraudulent scheme in either case.

> "The conviction must be affirmed for another reason. The indictment alleged, and the evidence established, in our opinion, that appellant devised a scheme to defraud, not only the various Gulf distributors, but also the Gulf Oil Company and Magie. *Appellant could not have intended to defraud either Gulf or Magie except by having the sales slips transmitted in the usual course by mail to Gulf for ultimate presentation to, and payment by Magie, and the scheme reasonably contemplated that such would be done.*" (Emphasis supplied)

To the same effect is the decision in *Kloian v. United States,* 349 F. 2d 291 (5 Cir. 1965), which held that a fraudulent scheme involving unauthorized credit card purchases was able to operate only through the utilization of the credit card system of extending credit, and its use of the mails, and that such use was material to the scheme and to the execution thereof.

As the facts of the present case are substantially identical to the *Adams* and *Kloian* facts, it is the Government's position that those decisions represent the applicable law on the issue of whether the mailing of delivery tickets is in execution of a scheme to defraud and to obtain property by false pretenses, and sufficiently distinguish the *Parr* and *Kann* cases cited above.

V. CONCLUSION

Appellee, United States of America, submits that there was no error in the proceedings of the United States District Court for the District of Nevada, and that in the light of the foregoing the judgment of conviction should be affirmed.

Dated, Las Vegas, Nevada,
March 15, 1966.

Respectfully submitted,

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MICHAEL DEFEO,
Special Assistant to
United States Attorney,

Attorneys for Appellee.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MICHAEL DEFEO,
Attorney for Appellee.